Supreme Court, U.S.
MOTION FILED

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No. 14-1468

In The

Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of North Dakota

MOTION OF INDIANA TECH LAW SCHOOL AMICUS PROJECT FOR LEAVE TO FILE AN AMICUS BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF NEITHER PARTY

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MOTION TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(b), Indiana Tech Law School Amicus Project respectfully moves to file the attached brief in support of neither party. Counsel for Petitioner has not responded to the Amicus Project's request for consent to file this brief. Respondent has consented by email.

Counsel for the Amicus Project is an Assistant Professor of Law at Indiana Tech Law School in Fort Wayne, Indiana. Counsel practices, teaches, and publishes in the areas of criminal and constitutional law. Counsel's publications address, among other things, the scope of privacy rights under the Fourth Amendment, particularly in circumstances where law enforcement officers perform warrantless searches.

As discussed in the attached brief, the Amicus Project believes that this case presents the Court with an opportunity to clarify the law regarding the permissibility of criminalizing warrantless blood draws. The Amicus Project respectfully submits that states may not criminalize a motorist's refusal to consent to a warrantless blood test where, as here, the statute upon which criminalization is based violates the Fourth Amendment, where alternative and less intrusive methods are available to establish probable cause that a motorist is driving while intoxicated, and where there is no risk that a motorist's blood-alcohol level will dissipate during the time in which a warrant is procured.

Thus, the Amicus Project submits that the Court should adopt a rule holding that states may not criminalize a motorist's refusal to consent to a warrantless blood test *unless* law enforcement officers are faced with exigent circumstances, such as where a motorist also refuses to consent to a breathalyzer or urine test, or where delays in obtaining a warrant will likely result in dissipation of a motorist's blood alcohol level. Such a rule will appropriately balance law enforcement's interest in deterring drunk driving while protecting motorists from unnecessary – and unreasonable – searches.

Accordingly, the Amicus Project respectfully requests that the Court grant the Amicus Project's motion for leave to file the attached brief as amicus curiae.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Amicus Curiae Indiana Tech Law School Amicus Project ("Amicus Project") strives to assist the Court in reaching decisions that guide law enforcement officers regarding the appropriate penalties that may be imposed for a motorist's refusal to submit to a warrantless breath, urine, or blood test. Counsel for the Amicus Project has substantial expertise in Fourth Amendment jurisprudence and has previously filed amicus briefs in *City of Los Angeles v. Patel*, 135 S. Ct. 400 (2014), *Riley v. California*, 134 S. Ct. 2473 (2014), and *Heien v. North Carolina*, 135 S. Ct. 530 (2014).[1]

Counsel has also written a number of scholarly articles in this area, including *Abidor v. Napolitano: Suspicionless Cell Phone and Laptop "Strip" Searches at the Border Compromise the Fourth and First Amendments*, 20 Northwestern L. Rev. *COLLOQUY* 280 (2014) (with Charles E. MacLean), *Back to the Future: Returning to Reasonableness and Particularity*

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[1] Counsel for Petitioner has not responded to the Amicus Project's request for consent to file this brief. Respondent has consented by email. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its law school, or its counsel made a monetary contribution to this brief's preparation or submission. The views expressed herein are solely those of the Indiana Tech Law School Amicus Project and do not necessarily represent the view of Indiana Tech Law School or the Indiana Institute of Technology.

Under the Fourth Amendment, 99 IOWA L. REV. Bulletin 101 (2014) (with Charles E. MacLean), and *Riley v. California: The New Katz or Chimel?* 20 Richmond J. L. & Tech. (2014) (with Charles E. MacLean).

SUMMARY OF ARGUMENT

> "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013)

N.D.C.C. §39-08-01, which criminalizes a motorist's refusal to consent to a warrantless blood test regardless of the circumstances, cannot withstand constitutional scrutiny.[2]

First, in violation of *McNeely*, the statute upon which criminalization is predicated – N.D.C.C. §39-20-01 – at least partially violates the Fourth

[2] The Amicus Project's argument is limited to the constitutionality of criminalizing a warrantless *blood* test, not breathalyzer or urine tests. A breathalyzer and, to a slightly lesser extent, urine test may be necessary in some cases to enable law enforcement to establish probable cause and obtain a warrant. Thus, criminalizing a suspect's refusal to submit to these tests may incentivize motorists to consent to such tests and therefore further the interests in deterring drunk driving and protecting public safety.

Amendment. Specifically, N.D.C.C. §39-20-01 creates a *per se* exigency exception to the warrant requirement, thus permitting warrantless blood draws of every motorist, regardless of whether exigent circumstances are present and justify dispensing with the warrant requirement. *See McNeely*, 133 S. Ct. at 1561 (although "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test," that fact "is a reason to decide each case on its facts . . . not to accept the 'considerable overgeneralization' that a *per se* rule would reflect") (*quoting Richards v. Wisconsin*, 520 U.S. 385, 393 (1997)). On this basis alone, the provision of N.D.C.C. §39-20-01 authorizing warrantless blood tests of every motorist, and the criminalization of a motorist's refusal to consent to such test, violates the Fourth Amendment.

Second, law enforcement officers have less intrusive means available at their disposal to obtain the same evidence and thus establish probable cause that a motorist is driving while intoxicated. *See, e.g.*, *Nelson v. City of Irvine*, 143 F.3d 1196, 1202 (9th Cir. 1998) ("breath and urine tests are equally effective as a blood test in determining whether a motorist has violated the DUI law"). Accordingly, permitting states to perform warrantless blood tests in every case, even where a motorist consented to a breathalyzer or urine test, thereby permitting a warrant to be readily obtained without risking dissipation of a motorist's blood-alcohol level, would allow states to evade

McNeely's case-by-case framework and unjustifiably infringe on privacy rights. Similarly, such a result is clearly untenable in those cases where the search at issue is ultimately deemed unreasonable, thus rendering the refusal lawful. This, in a nutshell, is the problem.[3]

Third, and as discussed in detail *infra*, criminalizing a motorist's refusal to consent to a warrantless blood test in every situation, particularly where the motorist has consented to breathalyzer and urine tests, represents an unnecessary and unprincipled expansion of the implied consent doctrine in the same way that warrantless cell phone searches impermissibly exceeded the scope of the search incident to arrest doctrine. *See Riley v. California*, 134 S. Ct. 2473, 2495 (2014); *Chimel v. California*, 395 U.S. 752, 762-763 (1969) (holding that warrantless searches incident to arrest were permissible to protect officers' safety and prevent evidence from being destroyed). Indeed, the reasoning in *Riley* provides the Court with a workable framework in which to analyze the constitutionality of N.D.C.C.

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[3] Of course, this is not to say that exigent circumstances can *never* exist to justify a warrantless blood search. It is to say, however, that exigencies should be evaluated on a case-by-case basis under the totality of the circumstances. *See Riley*, 134 S. Ct. at 2494 ("the exigent circumstances exception *requires* a court to examine whether an emergency justified a warrantless search in each particular case"). That is precisely the point – and the Court should rule similarly here.

§39-08-01's criminalization of a motorist's refusal to consent to a warrantless blood test.

By way of background, in *Riley* the Court unanimously held that, absent exigent circumstances, warrantless searches of cell phones incident to arrest are unreasonable and therefore violate the Fourth Amendment. 134 S. Ct. at 2495. The outcome in *Riley* can be traced to the Court's post-*Chimel* jurisprudence, in which the Court expanded the search incident to arrest doctrine to include searches that did not implicate officer safety or evidence preservation.

For example, in *New York v. Belton*, the Court relied in part on *Chimel* to hold that law enforcement officers could search a passenger compartment incident to arrest even though the motorist was in police custody and there was no risk that evidence would be destroyed. 453 U.S. 454, 462-463 (1981). In *Arizona v. Gant*, the Court expanded the search incident to arrest doctrine to permit searches of areas in a vehicle that officers reasonably believed contained evidence related to the crime of arrest. 556 U.S. 332, 343 (2009). The Court's holdings in *Belton* and *Gant* demonstrated that the bright-line rule adopted in *Chimel* had been expanded to such a degree that the original justifications for the search incident to arrest doctrine were little more than an afterthought.

The Court ended this charade in *Riley*, holding that warrantless cell phone searches did not implicate the original justifications underlying the search incident to arrest doctrine and therefore violated the

Fourth Amendment. Specifically, in *Riley*, the Court curtailed a decades-old and unprincipled expansion of the search incident to arrest doctrine, in which searches of passenger compartments, plastic containers, and other objects were upheld even though there was no threat to officer safety and no risk that evidence would be destroyed. In so doing, the Court held that, absent exigent circumstances, law enforcement officers could not search a cell phone without a warrant. *See Riley*, 134 S. Ct. at 2495.

Significantly, the Court reached this result even though arrestees, like citizens operating motor vehicles on public roads, enjoy a *reduced* expectation of privacy. *See id.* at 2588 ("[T]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search 'is acceptable solely because a person is in custody.'") (*quoting Maryland v. King*, 133 S. Ct. 1958, 1979 (2013)); *accord United States v. Jones*, 132 S. Ct. 945 (2012) (holding that the use of a GPS tracking device to monitor a motorist's movements for twenty-eight days violated the Fourth Amendment).

The Court's reasoning in *Riley* provides a sound analytical framework in which to hold that law enforcement may not perform warrantless blood tests, and states cannot criminalize a motorist's refusal to submit to such a test, *unless* officers are faced with *truly* exigent circumstances. In cases where motorists consent to breathalyzer or urine tests or law enforcement has ample time to obtain a warrant without

risking dissipation of a motorist's blood-alcohol level, the need to perform a *warrantless* blood test is not necessary to establish probable cause that a motorist is driving while intoxicated. Thus, criminalizing a suspect's refusal in this context is neither reasonable nor necessary to further the interests underlying the implied consent doctrine: deterring drunk driving and protecting public safety.

Put differently, criminalizing the refusal to submit to a warrantless blood test should only be permitted where a motorist refuses to consent to a breathalyzer or urine test, thus rendering it necessary, at least in some cases, to perform warrantless blood tests to establish probable cause of a DWI violation, *or* to avoid dissipation in a motorist's blood-alcohol level where officers are faced with lengthy delays in procuring a warrant.

In these limited circumstances, permitting states to criminalize the refusal to consent to a warrantless blood test would further the interest in deterring drunk driving and protecting public safety, and strike the proper balance between the investigatory needs of law enforcement and a motorist's privacy rights. In the absence of exigent circumstances, the message to states that seek to force motorists, under threat of criminal prosecution, to undergo warrantless blood tests should be simple – get a warrant.

For the foregoing reasons, the North Dakota Supreme Court's decision should be reversed.

ARGUMENT

I. N.D.C.C. §39-08-01 Violates The Fourth Amendment Because The Statutory Provision Upon Which Violations Are Based – N.D.C.C. §39-20-01 – Is At Least Partially Unconstitutional.

Reasonableness is the touchstone of Fourth Amendment analysis. *See Riley*, 134 S. Ct. at 2482 ("[A]s the text makes clear, 'the ultimate touchstone of the Fourth Amendment is reasonableness.'") (*quoting Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). Whether a search is unreasonable "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself," and entails "'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Skinner v. Railway Lab. Execs. Ass'n*, 489 U.S. 602, 619 (1989) (*quoting United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *Delaware v. Prouse*, 440 U.S. 648, 656 (1979)); *see also Samson v. California*, 547 U.S. 843, 848 (2006) (relying on the totality of the circumstances "to determine whether a search is reasonable within the meaning of the Fourth Amendment") (*quoting United States v. Knights*, 534 U.S. 112, 118 (2006)) (internal quotation marks omitted).[4]

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[4] Against this backdrop, at least one court has held that "a warrantless blood test, performed without consent, is *presumptively* unreasonable unless the state actors involved had probable

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Thus, given "the fact-specific nature of the reasonableness inquiry," the Court "evaluate[s] each case of alleged exigency based on its own facts and circumstances." *McNeely*, 133 S. Ct. at 1559 (*quoting Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)), *abrogated by Arizona v. Gant*, 556 U.S. 332 (2009). As the Court noted in *McNeely*, "[n]umerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments." 134 S. Ct. at 1564.

For these reasons, the Court has refused to adopt a *per se* exception to the warrant requirement. *See, e.g.*, *Richards*, 520 U.S. 385, 391-396 (1997) (rejecting a *per se* exception to the knock-and-announce requirement for felony drug investigations based on presumed exigency, and requiring instead evaluation of police conduct "in a particular case"); *McDonald v. United States*, 335 U.S. 451, 456 (1948) (holding that "[w]e cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative").

In *McNeely*, a four-member plurality of the Court specifically rejected the state's attempt to create a *per*

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cause and exigent circumstances sufficient to justify it." *Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1172 (10th Cir. 2003) (emphasis added).

se exception for warrantless blood tests. *See McNeely*, 133 S. Ct. at 1564 ("[W]hile the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake.").[5] Writing for the plurality, Justice Sotomayor held that the dissipation of a motorist's blood-alcohol level – the most common reason given to justify warrantless blood tests – does not support such an exception.[6] *See id.* at 1568 ("[T]he natural dissipation of alcohol in the bloodstream does not constitute an exigency in *every case* sufficient to

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[5] The *McNeely* plurality also explained that "adopting the State's *per se* approach . . . might well diminish the incentive for jurisdictions 'to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.'" *McNeely*, 133 S. Ct. at 1563 (internal citation omitted).

[6] In *McNeely*, the plurality identified various circumstances where an exigency renders it impractical to obtain a warrant, all of which depend on a careful, face-sensitive, case-by-case analysis. *See, e.g.*, *Michigan v. Fisher*, 558 U.S. 45, 47-48 (2009) (per curiam); *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (engaging in "hot pursuit" of a fleeing motorist); *Michigan v. Tyler*, 436 U.S. 499, 509-510 (1978) (entering a burning building to put out a fire and investigate its cause). Exigencies are also based on the need to prevent the imminent destruction of evidence *See, e.g.*, *Cupp v. Murphy*, 412 U.S. 291, 296 (1973); *Ker v. California*, 374 U.S. 23, 40-41 (1963) (plurality opinion). As the Court held in *McNeely*, those circumstances are not present where law enforcement takes a warrantless and nonconsensual blood test of a motorist suspected of driving while intoxicated.

justify conducting a blood test without a warrant.") (emphasis added). In so holding, Justice Sotomayor noted that, although "dissipation of alcohol in the blood may support a finding of exigency in a specific case," the question of whether a warrantless blood test of a drunk-driving motorist is reasonable "must be determined case by case based on the totality of the circumstances." *Id.* at 1563.

This approach implicitly recognizes that warrantless blood tests are not always necessary. For example, in situations where "the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the motorist is being transported to a medical facility by another officer," there could be no "plausible justification for an exception to the warrant requirement." *Id.* at 1561. As such, "[w]hile the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." *Id.* at 1564.[7]

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[7] This approach is consistent with the practices of many states, which "lift restrictions on nonconsensual blood testing if law enforcement officers first obtain a search warrant or similar court order." *Id.* at 1566. In addition, "a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a motorist's refusal (often limiting testing to cases involving an accident resulting in death or serious

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Applying this framework, the provision of N.D.C.C. §39-20-01 authorizing warrantless blood tests in every case violates the Fourth Amendment. N.D.C.C. §39-20-01 impermissibly establishes a *per se* exception to the warrant requirement and thereby forecloses a case-by-case evaluation of whether a warrantless blood test was reasonable under the circumstances.

Importantly, however, invalidating the portion of N.D.C.C. §39-20-01 that authorizes warrantless blood tests in every case does not end the constitutional inquiry. It remains unsettled whether the *criminalization* of a motorist's refusal to consent to a warrantless blood test is *always* unconstitutional, particularly where exigent circumstances, such as a motorist's refusal to consent to breathalyzer or urine tests, justify dispensing with the warrant requirement, or where lengthy delays in obtaining a warrant makes it likely that a motorist's blood-alcohol level will dissipate.

In fact, in *McNeely* the Court cited with approval laws that authorized *civil* penalties and inferences of guilt for refusing to consent to blood-alcohol tests, but did not address the constitutionality of criminalizing a motorist's refusal. *See McNeely*, 133 S. Ct. at 1566 (noting that "[s]uch laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended

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bodily injury) or prohibit nonconsensual blood tests altogether"). *Id.*

or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution").

As discussed below, the Court's decision in *Riley* provides a workable framework to resolve this question, and to effectively balance the interest in protecting public safety with the privacy rights of motorists.

II. Under N.D.C.C. §39-08-01, The Criminalization Of A Motorist's Refusal To Consent To Warrantless Blood Test Exceeds The Scope Of The Implied Consent Doctrine.

The interests in deterring drunk driving and protecting public safety support the proposition that motorists implicitly consent to *some* searches aimed at determining blood-alcohol content. However, States should not be permitted to criminalize a motorist's refusal to consent to a warrantless blood test particularly where the underlying statutory provision – §39-20-01 – prohibits *any* court from evaluating whether such test, in a given case, violates the Fourth Amendment.

The parallels between *Riley* and *Birchfield* are striking and the analysis articulated by the *Riley* Court offers an elegant model for both conducting the necessary balancing of privacy rights and public safety, while also providing clear guidance to law enforcement in handling DWI investigations. Specifically, just as the *Riley* Court held that the search incident to arrest doctrine did not permit law enforcement to conduct warrantless searches irrespective

of threats to officer safety or the need to preserve evidence, here the Court should hold that the implied consent doctrine should not be construed to mean that officers can *criminalize* the refusal to submit to a warrantless blood test in every case, irrespective of whether it is necessary or reasonable to perform such tests.

In *Riley*, the Court implicitly recognized that its search incident to arrest jurisprudence had been expanded to unprecedented proportions and rendered the original justifications underlying searches incident to arrest little more than an afterthought. *See Belton*, 453 U.S. 454 (upholding the search of a passenger compartment even though the motorist was already in custody); *Gant*, 556 U.S. 332 (expanding the search incident to arrest doctrine to include areas that might reasonably contain evidence related to the crime of arrest). The Court recognized that permitting law enforcement officers to perform warrantless searches of cell phones would have represented an unprecedented expansion of *Chimel* while having no relationship whatsoever to furthering the interest in protecting officers' safety and preserving evidence.[8]

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[8] In *Riley*, the Court also emphasized that warrantless cell phone searches constituted a more severe infringement on privacy interests than searches of finite objects such as passenger compartments and plastic containers. *See Riley*, 134 S. Ct. at 2490. Justice Roberts stated as follows:

> [T]here is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of

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Although implied consent laws were not at issue in *Riley*, the Court's reasoning, as well as the rule adopted, should be applied here. N.D.C.C. §39-08-01 criminalizes a motorist's refusal to consent to a warrantless blood search even though law enforcement have at their disposal breathalyzer and urine tests, which can accurately calculate a motorist's blood-alcohol level, to establish probable cause that a suspect is driving while intoxicated. In such circumstances, there is little, if any, need to force *every* motorist to a *warrantless* blood test, particularly where the motorist has consented to a breathalyzer or urine test, thus eliminating the risk that a motorist's blood-alcohol level will dissipate during the time in which law enforcement officers obtain a warrant.

As such, criminalizing the refusal to submit to a warrantless blood test, without even evaluating whether law enforcement officers were faced with exigent circumstances, such as a motorist's refusal to consent to a breathalyzer or urine test or a lengthy delay in obtaining a warrant, is patently unreasonable. *See, e.g.*, *Nelson*, 143 F.3d at 1201 ("[W]hen a DUI arrestee consents to undergo a breath or urine test, the government has available to it an effective alternative to

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sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower. *Id.*

a blood test as a means of obtaining the same evidence.").[9] As the Ninth Circuit held in *Nelson*, "[c]onsent to a breathalyzer test may very well have reduced to insignificance the defendants' need to extract [plaintiff's] blood." *Id.* (*quoting Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991)). Put simply, absent a compelling *need* to administer a warrantless blood test (e.g., to establish probable cause or prevent dissipation of a motorist's blood-alcohol level) criminalizing the refusal to submit to a warrantless blood test has little to do with protecting public safety, and everything to do with attempting to evade *McNeely*'s holding and avoid a case-by-case evaluation of whether such searches are reasonable under the Fourth Amendment. *See, e.g.*, *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (exigent circumstances are present "when the exigencies of the situation make the needs of law enforcement so compelling" that a warrantless search is necessary).

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[9] In *Skinner*, the Court recognized that blood tests implicate Fourth Amendment privacy protections:

> Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in the employee's bloodstream and nothing more . . . *[B]reath tests reveal no other facts in which the employee has a substantial privacy interest*. 489 U.S. at 625 (emphasis added).

Yet, the plain language of N.D.C.C. §39-20-01 leads to precisely that result, and that is precisely why it fails to withstand constitutional scrutiny.

To be sure, "[n]o matter how serious the offense, the availability of an equally effective, consensual method of obtaining the evidence conclusively renders use of the nonconsensual method *unreasonable*." *Hammer*, 932 F.2d at 852 (Kozinski, J., concurring) (emphasis added) (also noting that, "[i]f the motorist requests a breath or urine test and it will do the job just as well, it must be used in lieu of a blood test-even where the suspected crime is murder in the first degree").

In *McNeely*, the four-member plurality relied in part on the availability of less intrusive searches when rejecting a *per se* exigency exception for warrantless blood tests. *See McNeely*, 133 S. Ct. at 1566 (holding that "[s]tates have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws"). For example, the *McNeely* Court pointed out that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id.*

The parallels with *Riley* do not stop there. Just as arrestees retain significant privacy interests in the contents of a cell phone despite having a *reduced* expectation of privacy on public roadways, motorists also retain a substantial privacy interest in their bodily integrity, particularly where alternative search

methods are available to ensure that law enforcement's interest in deterring drunk driving is not hindered. As the Court held in *McNeely*, "the fact that people are 'accorded less privacy in . . . automobiles because of th[e] compelling governmental need for regulation . . . does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin.'" 133 S. Ct. at 1565 (*quoting California v. Carney*, 471 U.S. 386, 392 (1985)); *see also Winston v. Lee*, 470 U.S. 753, 760 (1985) (holding that "invasions of bodily integrity implicate an individual's 'most personal and deeply-rooted expectations of privacy'").

Accordingly, criminalizing a refusal to consent represents an unprecedented expansion of the implicit consent doctrine in the same way that searches of passenger compartments and plastic containers represented an unprecedented expansion of the search incident to arrest doctrine. The original justifications underlying the implied consent doctrine – deterring drunk driving and protecting public safety – do not support a wholesale exception for warrantless blood tests and certainly not the criminalization of a refusal to consent to such tests in every or even any situation.

As a result, the Court should prohibit states from criminalizing warrantless blood tests *unless* a motorist refuses to consent to a breathalyzer or urine test, thus making it difficult to establish probable cause, *or* where *truly* exigent circumstances exist that render it *necessary* to perform a test without a warrant. The

only way to determine whether this standard is satisfied and criminalization proper is by assessing such searches on a case-by-case basis.

III. A Case-By-Case Approach To Warrantless Blood Testing Will Provide Guidance To Law Enforcement Officers, Further The Interest In Deterring Drunk Driving, And Preserve Privacy Protections.

Evaluating the reasonableness of warrantless blood tests on a case-by-case basis will appropriately balance the need of law enforcement to protect the public with a motorist's privacy interests. *See McNeely*, 133 S. Ct. at 1555 ("[W]hile some progress has been made, drunk driving continues to exact a terrible toll on our society."); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("[N]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."). Officers will have ample tools available at their disposal (e.g., field, breathalyzer, and urine tests) to investigate whether a motorist is operating a vehicle while intoxicated, motorists will be protected from unreasonable and unnecessary searches, and warrantless blood tests will be permitted where a *true* exigency exists.

As the *McNeely* plurality explained, "[w]e are aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that

have them." 133 S. Ct. at 1567. In fact, "field studies in States that permit nonconsensual blood testing pursuant to a warrant have suggested that, although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence" (*citing Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710-2711 (2011)) (noting that the blood test was obtained pursuant to a warrant after the petitioner refused a breath test); NHTSA *Use of Warrants for Breath Test Refusal: Case Studies* 36-38 (No. 810852, Oct. 2007).

In addition, technological advances substantially increase the likelihood that officers will have sufficient time to procure a warrant before blood-alcohol level begins to dissipate. As the Court noted in *McNeely*, "a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing." 133 S. Ct. at 1562. In addition, "jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations." *Id.* Thus, adopting a *per se* exigency exception would disregard "the current and future technological developments in warrant procedures." *Id.* at 1563 (*quoting State v. Rodriguez*, 2007 UT 15, ¶ 46, 156 P.3d 771, 779 (Utah 2007)).

This framework will also incentivize law enforcement to carefully consider whether the circumstances justify dispensing with the warrant

requirement, rather than give law enforcement freewheeling authority to take a motorist's blood at any time – and for whatever reason.

Ultimately, if N.D.C.C. §§39-20-01 and 39-08-01 are upheld, the Court will send a message that states can circumvent the Fourth Amendment with legislation that admittedly achieves worthy policy objectives, yet does so at the expense of core constitutional protections. In *Riley*, the Court's decision recognized this fact, and implicit in its holding was the admonition that the objective of serving the public good, such as by deterring drunk driving, must not be achieved through laws that make the public less free and the Constitution less relevant.

CONCLUSION

For the foregoing reasons, the judgment of the North Dakota Supreme Court should be reversed.

Respectfully submitted,

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